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No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER, ET AL.,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONERS

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31 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THERE IS NO CONSENSUS AMONG FACULTY, STUDENTS OR BENEFICIARIES OF RACIAL PREFERENCES THAT SUPPORTS THE LAW SCHOOL'S ADMISSIONS POLICY. 4

A. Most Faculty Oppose Racial Preferences. 5

B. Most Students Oppose Racial Preferences. 7

C. Most African-Americans and Hispanic-Americans Disfavor Admissions Policies Like The Law School's. 8

II. THIS COURT HAS FORECLOSED THE LAW SCHOOL'S RELIANCE ON GROUP IDENTITY AND GROUP EXPERIENCE 11

A. This Court's Jurisprudence Is Antithetical To The Lower Court's Reliance On "Group Identity." 12

B. The Law School's Reliance on Justice Powell's Diversity Rationale Ignores *Bakke*'s Controlling Holding.....15

III. EDUCATORS' RELIANCE ON GROUP IDENTITY HAS LED TO LESS, NOT MORE, CAMPUS INTEGRATION. 18

IV. UNIVERSITIES' RELIANCE ON GROUP IDENTITY HAS COME AT THE EXPENSE OF INDIVIDUAL EXPRESSION.....22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).....12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).....12, 13, 14

Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).....23

Freeman v. Pitts, 503 U.S. 467 (1992).....14, 15

Gratz v. Bollinger, No. 02-516.....2

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) 14

Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001).....14

Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).....14, 15

Marks v. United States, 430 U.S. 188 (1977).....15, 16, 17

Metropolitan Broad., Inc. v. FCC, 497 U.S. 547 (1990).....13

Miller v. Johnson, 515 U.S. 900 (1995) 12

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 15, 16, 17

Shaw v. Hunt, 517 U.S. 899 (1996) 12

Shelley v. Kraemer, 334 U.S. 1 (1948) 12

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 14, 15

OTHER SOURCES

Connecticut Ass'n of Scholars Survey (Apr. 2000) 6

DINESH D'SOUZA, ILLIBERAL EDUCATION (1991) 22, 23

Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan,* 53 BAYLOR L. REV. 289 (July 2001) 16, 17

The Gallup Poll (June 13-16, 1991) 8

Doug Hardy, *UConn Survey Spurs Angry Responses, Questions*, J. INQUIRER, Apr. 19, 2000, at 5 24

ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY (1998) 23

Ramin Afshar-Mohajer & Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/ Separatism in Higher Education* (Sept. 9, 2002), *available at* nycivilrights.org/ reports/pdfs/nycrc_campusrept.pdf 19, 20, 21

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Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 13

Stanley Rothman, Seymour Martin Lipsett & Neil Nevitte, *Diversity and Affirmative Action: The State of Campus Opinion*, ACADEMIC QUESTIONS (forthcoming Fall 2002) 6, 7

PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE (1997) 11

PAUL M. SNIDERMAN & THOMAS PIAZZA, BLACK PRIDE AND BLACK PREJUDICE (2002) 9, 10

Washington Post/Kaiser/Harvard Poll (Mar. 8-Apr. 22, 2001), *available at* nationaljournal.com/ members/ polltrack/2001/issues/ 01affirmativeaction.htm 8

Thomas E. Wood, *Who Speaks for Higher Education on Group Preferences?*, ACADEMIC QUESTIONS, Spring 2001, at 31 ..... 6, 24

Zogby Academic Life Survey (Apr. 7, 2000), *available at* gofast.org/academiclifesurvey.htm 7

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BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF SCHOLARS
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Scholars is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States.[1] NAS has more than 4,300 members, organized into 46 state affiliates, and includes within its ranks some of the nation's most

[1] Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* NAS certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than NAS, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

distinguished and respected scholars in a wide range of academic disciplines.

The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

NAS opposes racial, ethnic, and sex-based preferences in faculty hiring and student admissions because it believes that such preferences are inimical to the principles to which NAS is dedicated and to the American ideal of equality of opportunity without regard to race or color, to which NAS's members are committed. NAS views with great concern the impact that the institutionalization of racial, ethnic, and sex-based preferences has had on higher education and on American society.

NAS has also submitted an *amicus curiae* brief in the companion case *Gratz v. Bollinger*, No. 02-516, involving undergraduate admissions to the University of Michigan, pointing out that the principal study on which the University and the Law School rely wholly fails to support the claim that racial diversity of a student body yields educational benefits that constitute a compelling governmental interest. NAS argues that this study is irrelevant because it does not measure whether racial diversity (let alone racial diversity achieved by racial preferences) leads to any educational benefits. NAS will not repeat the arguments made in its brief in the companion case, but asks that they be considered here.

SUMMARY OF ARGUMENT

In the decision below, the Sixth Circuit deferred to the "educational judgment and expertise of the [University of Michigan] Law School's faculty and admissions personnel regarding" use of a "race-conscious admissions policy" that is independent of any "remedial interest" and that "does not have a self-contained stopping point." Pet. App. 37a-38a. The Law School claimed that the racial preferences embodied in its admissions policy are supported by a national consensus of educators. *See* C.A. Reply Brief of Defendants-Appellants, at 17. The Law School based this "educational judgment" favoring a race-conscious admissions policy on the view that students from certain "racial and ethnic groups" "have experiences and perspectives of special importance to [its] mission." Pet. App. 7a, 27a (quoting law-school admissions policy). After thus equating membership in a racial or ethnic group with a particular set of experiences and perspectives, the Law School asserted that, in its "educational judgment," *id.* at 35a-37a, "meaningful interaction among students of different racial backgrounds improves the quality of education at the Law School in many important ways," Br. in Opp. 3.

In fact, there is no national consensus among educators favoring the use of racial preferences. Most faculty and students disfavor racial preferences in admissions. Indeed, recent research reveals that most African-Americans and Hispanic-Americans, the principal intended beneficiaries of such preferences, reject them.

Further, the theory underlying the supposed educational consensus in support of racial preferences – the Law School's rationale that students from certain "racial and ethnic groups" "have experiences and perspectives of special importance to [its] mission," Pet. App. 7a, 27a (quoting law-school admissions policy) – has been forcefully repudiated by this Court's precedents. These decisions forbid the

attribution by state actors of thoughts, identity, or experiences to a particular individual because of his or her race.

These precedents are well founded. Group-identity theory has led to less, not more, campus integration, in direct conflict with the proposition, advanced by the Law School in this Court, that "meaningful interaction among students of different racial backgrounds improves the quality of education at the Law School in many important ways." Br. in Opp. 3.

Treating individuals as members of a racial group, rather than as individuals, has even led universities, including the University of Michigan, to stifle open debate on controversial racial issues, including the system of racial preferences at issue in this case.

ARGUMENT

I. THERE IS NO CONSENSUS AMONG FACULTY, STUDENTS OR BENEFICIARIES OF RACIAL PREFERENCES THAT SUPPORTS THE LAW SCHOOL'S ADMISSIONS POLICY.

The Law School's claim below[2] that racial preferences are supported by a national consensus of educators is, in the first place, of dubious relevance. An individual's right to equal treatment under the Constitution cannot be at the mercy of the shifting views of a small group of academics or hostage to popular opinion. Rather than looking to faculty and student opinions, this Court should instead be guided by the text of the Fourteenth Amendment and well-established constitutional norms that forbid a state,

[2] *See* C.A. Reply Brief of Defendants-Appellants, at 17.

absent the most extraordinary circumstances, to deal with people differently because of their membership in this or that racial group.

In any event, the national consensus invoked by the University simply does not exist. Empirical data reveal that most university faculty and students oppose racial preferences in student admissions. Further, African-Americans and Hispanic-Americans – the groups that are the primary intended beneficiaries of racial preferences – overwhelmingly oppose their continuation.

A. Most Faculty Oppose Racial Preferences.

NAS has sponsored two faculty opinion surveys regarding the use of racial preferences in student admissions. The first survey, in 1996, was conducted by the Roper Center (now known as the Center for Survey Research and Analysis ("CSRA")) at the University of Connecticut and covered colleges and universities throughout the country.[3] The second survey, in April 2000, conducted by the same center, questioned faculty in the Connecticut public-university system.[4] Both surveys elicited responses on an unattributed basis so that faculty members could express their views freely.

When college and university faculty were asked in the 1996 nationwide survey whether their schools "*should or should not* grant preferences to one applicant over another for admission on the basis of race, sex, or ethnicity," they decisively rejected the use of such preferences in admissions: 56 percent replied that their schools should not use such

[3] The results of this survey appear at Appendix A to NAS's court of appeals brief and are available at nas.org.

[4] The results of this survey appear at Appendix B to NAS's court of appeals brief and are available at nas.org.

preferences, while only 32 percent said that they should. National Faculty Survey 1996, Roper Center for Public Opinion Research, University of Connecticut (emphasis added)[5]; *see also* Stanley Rothman, Seymour Martin Lipsett & Neil Nevitte, *Diversity and Affirmative Action: The State of Campus Opinion*, ACADEMIC QUESTIONS (forthcoming Fall 2002) (manuscript at 14) (finding that 56 percent of faculty oppose racial preferences "in jobs or college admissions"), *available at* nas.org.

The opposition to racial preferences was found to be even stronger in the part of the 1996 survey focusing exclusively on public universities such as the University of Michigan. Sixty-one percent of public-university faculty said that their universities should not grant race- or sex-based preferences in admissions, and only 29 percent said that they should. *See* National Faculty Survey 1996.

The April 2000 CSRA survey of Connecticut faculty produced results similar to those of the 1996 survey. Faculty at Connecticut's public institutions of higher education were asked whether their school should grant racial preferences in student admissions. Opposition to racial preferences in student admissions ranged from 73 percent to 47 percent of faculty at the educational institutions surveyed, while support for such preferences ranged from 9 percent to 35 percent. *See* Connecticut Ass'n of Scholars Survey (Apr. 2000).

In sum, the premise that faculty view racial preferences as essential to the basic purposes of higher education, or even as desirable, is unfounded. Instead, most university faculty oppose the use of racial preferences in student admissions. *See generally* Thomas E. Wood, *Who Speaks for Higher Education on Group Preferences?*,

[5] The remaining respondents either did not know or refused to answer (and are listed as "DK/REF" in the results of the survey).

ACADEMIC QUESTIONS, Spring 2001, at 31-45 (summarizing survey research on attitudes toward racial preferences in higher education).

B. Most Students Oppose Racial Preferences.

Two recent nationwide surveys of students concerning the use of racial preferences found most students decidedly opposed. *See* Zogby Academic Life Survey (Apr. 7, 2000), *available at* gofast.org/academiclifesurvey.htm; Rothman, *et al*, *State of Campus Opinion*, *supra* (manuscript at 14-15). In the Zogby survey, when asked on an "agree" or "disagree" basis whether universities should "give minorities preferential treatment in admissions," 77.3 percent of students polled responded that minority students should not receive such preferences. Zogby Academic Life Survey, *supra*; *see also* Rothman, et al., *State of Campus Opinion*, *supra* (manuscript at 14-15) (finding that 85 percent of students oppose racial preferences "in jobs or college admissions"). The Zogby survey concluded: "The issue of ethnic diversity stands out as an area where students disagree with current trends in college education. *While 84.3% of students said ethnic diversity on campus is important, 86.4% oppose racial preferences in admissions, favoring fairness instead.* Almost all (95.7%) said diversity of ideas (56.8%) and high academic standards (38.9%) are more important to a quality education than achieving ethnic diversity (2.9%)." Zogby Academic Life Survey, *supra* (emphasis added); *see also* Rothman, et al., *State of Campus Opinion*, *supra* (manuscript at 14-15) (finding that 75 percent of students oppose relaxing academic standards to admit more minority undergraduates; 76 percent oppose relaxing academic standards to hire more minority faculty).

In other words, students on campus are quite aware of, and overwhelmingly opposed to, the use of racial preferences in admissions. As we will discuss below in Part III, rather than being "essential" to education, the continued

use of racial preferences in the face of overwhelming student opposition may actually foster racial balkanization, and stereotyping, on campus.

C. Most African-Americans and Hispanic-Americans Disfavor Admissions Policies Like The Law School's.

Even the intended beneficiaries of racial preferences overwhelmingly oppose their use. A spring 2001 public-opinion poll conducted by the Washington Post, Kaiser Family Foundation, and Harvard University asked:

> In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?

Washington Post/Kaiser/Harvard Poll (Mar. 8-Apr. 22, 2001), *available at* nationaljournal.com/members/ polltrack/ 2001/issues/01affirmativeaction.htm.

Of African-American respondents, 86 percent answered that decisions should be based purely on merit, compared to 12 percent who said race should be a factor. Hispanic-American respondents were equally opposed: 88 percent answered that decisions should be based purely on merit, compared to 7 percent who said race should be a factor. Similarly, a 1991 Gallup Poll found that 69 percent of African-Americans rejected the proposition that, "to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college," and instead answered that "ability, as determined by test scores, should be the main consideration." The Gallup Poll (June 13-16, 1991), question 11.

This opposition holds even when the poll states that the white and minority college applicants are equally qualified. In December 1997, a New York Times/CBS News Poll found that 63 percent of African-American respondents said that "race should not be a factor" in deciding how "equally qualified college applicants" should be treated. Only 25 percent of African-American respondents voted to "accept [the] minority to achieve racial balance." New York Times/CBS Poll (Dec. 6-9, 1997), *available at* national journal.com/members/polltrack/1997/issues/97racerelations .htm.

In a book published last year by Princeton University Press, two researchers, one from Stanford and one from the University of California, confirmed these results. *See* PAUL M. SNIDERMAN & THOMAS PIAZZA, BLACK PRIDE AND BLACK PREJUDICE (2002). The authors conducted a variety of opinion-survey experiments with African Americans, including a so-called "SAT experiment." *Id.* at 143-54. Interviewers provided black survey participants "with a description of two young men who are applying to college: George, who is black, and Sam, who is white." *Id.* at 145. The survey continued that "both [applicants] took the same 'college entrance exam.' Sam scored 80 out of a possible 100 points – a high enough score to establish him as a good candidate, but not so high for him automatically to be admitted. Sam's score always [was] the same." *Id.*

The researchers varied George's score "by increments of 5, from a low of 55 to a high of 75," the result being "a whole span of differences: at the largest, the white candidate does overwhelmingly better than the black, outscoring him by 25 points; at the smallest, the white candidate does barely better than the black, outscoring him by only 5 points." *Id.* The survey respondents – all African-Americans – were then asked the following question:

> If the college can only accept one of the two young men, who do you think should be admitted – George, because of the obstacles faced by blacks, or Sam, because his score on the entrance exam was higher?

Id. at 146. The authors explain that the question was phrased to pose directly the following dilemma: "On the one side, every one is reminded that the score of the white applicant on the entrance exam was higher. . . . On the other side, the case for admitting the black applicant because of the continuing burden of discrimination and disadvantage that blacks bear is driven home directly, unambiguously, without a possibility of misunderstanding." *Id.*

Contrary to the researchers' expectation – "that when the difference between the two [students] in their entrance examinations was small, blacks would disregard the scores" and choose the black candidate, *id.* at 146 – "[b]lacks overwhelmingly choose the candidate who scored higher, even though the higher-scoring candidate always is white, and they choose the white candidate over the black however small the difference between the scores," *id.* at 149. In fact, more than 75 percent of the African-American survey respondents chose the white applicant with the higher score when the difference in scores was at its lowest, 5 points. *See id.*

These studies demonstrate that when respondents are squarely presented with the issue of whether colleges should employ racial preferences in their admissions – as distinguished from vaguer questions concerning the merits of such undefined concepts as "diversity" or "affirmative

action"[6] – even the purported beneficiaries of a policy of racial preferences are overwhelmingly opposed.

In sum, there is no consensus in favor of the type of racial preferences the Law School seeks to defend in this case. The cited studies indicate that most faculty members, most students, and most African-Americans and Hispanic-Americans oppose an admissions policy that awards preferences to members of minority groups.

II. THIS COURT HAS FORECLOSED THE LAW SCHOOL'S RELIANCE ON GROUP IDENTITY AND GROUP EXPERIENCE.

In addition to there being no "consensus" on racial preferences, the basis for that supposed consensus – that "students from groups which have been historically discriminated against have experiences that are integral to [the Law School's] mission," Br. in Opp. 3 – cannot be legally supported. Creating and maintaining state-sponsored

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[6] As Professor Sniderman and another collaborator, Edward G. Carmines, explain, the definition of affirmative action makes a tremendous difference. *See* PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 23-27 (1997). In this survey experiment, the researchers asked one group of white respondents whether, "because of past discrimination, qualified blacks should be given preference in university admissions," and asked a second group whether, "because of past discrimination, an extra effort should be made to make sure that qualified blacks are considered for university admissions." Seventy-five percent of whites opposed the "preferential treatment" program, compared to 65% who *supported* the "extra effort" program. *Id.* at 23-26. This, the researchers concluded, shows a consistent adherence to a fairness principle. When "special attention is necessary and appropriate to make sure [blacks] are judged by the same standards as everybody else," a majority of respondents favors "affirmative action." *Id.* at 27. But, "an even larger majority object[s] to affirmative action when it means that blacks will receive not special attention, but special treatment." *Id.*

programs on such theories of "group identity" is antithetical to the rights accorded to *individuals* under the Fourteenth Amendment. The Fourteenth Amendment to the Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Because the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), "a [state's] racial classification causes 'fundamental injury' to the 'individual rights of a person,'" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal citation omitted).

Accordingly, this Court's precedents set a high hurdle for any state actor that wishes to apply a race-based classification. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (same). The "group identity" rationale advanced by the Law School and adopted by the lower court does not satisfy this heavy burden because it contradicts the fundamental precept that the Fourteenth Amendment protects *individuals'* rights.

A. This Court's Jurisprudence Is Antithetical To The Lower Court's Reliance On "Group Identity."

The court below relied upon and adopted the Law School's assertion that "[s]tudents from [underrepresented] racial and ethnic groups are 'particularly likely to have experiences and perspectives of special importance to our mission.'" Pet. App. 7a (internal quotation and citation omitted); *see also* Pet. App. 27a.

This Court has held that treating "individuals as the product of their race" is impermissible stereotyping prohibited by the Fourteenth Amendment. *Miller v. Johnson*, 515 U.S. 900, 912 (1995). As Justice O'Connor has noted, "[s]ocial scientists may debate how peoples' thoughts and

behavior reflect their background, but the Constitution provides that the government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). Years ago, a perceptive legal scholar made the point eloquently. Judge Posner, then Professor Posner, wrote that "the use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12.

The Law School's reliance on racial stereotypes is also to be condemned because it lacks any guaranteed stopping point. The court of appeals held that "the district court's determination that the Law School's consideration of race and ethnicity lacks a definite stopping point . . . does not render the admissions policy unconstitutional." Pet. App. 37a. An academic institution's interest in racial diversity "does not have a self-contained stopping point," the court said by way of explanation, adding that it was satisfied by the Law School's stated intention "to consider race and ethnicity . . . only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means." *Id.* at 38a. When that possibility might be realized neither the court nor the Law School's spokesmen ventured to say. Thus, this Court is confronted with the possibility of perpetual or near-perpetual racial preferences – a possibility that Justice O'Connor warned against in the prevailing opinion in *Croson*. Joined on this point by three other Justices, Justice O'Connor found that, in cases of remedial racial preferences, findings of need for such action are required "to assure all citizens that the deviation from the

norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Croson*, 488 U.S. at 510.

Finally, the Sixth Circuit's deference to the Law School's "educational judgment" has remarkable implications for individual liberty. Although academic freedom is meant to protect individual scholars from state control of their scholarship, *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996), under the lower court's holding the state is given the authority to discriminate against individuals so long as it furthers the interests of group identity or group experience – *i.e.*, "diversity." In this regard, such an "educational judgment" rationale appears to validate all manner of discrimination against individual applicants for admission to a state university. For example, in accordance with this reasoning a state institution can limit the admission of women or of minority individuals – a conclusion that is repugnant to established Equal Protection jurisprudence.

Indeed, in a recent case, *Johnson v. Board of Regents*, 263 F.3d 1234 (11th Cir. 2001), a state university argued that it could limit the number of women it admitted because women were "overrepresented" and thus men were "underrepresented." The Eleventh Circuit, affirming a district court judgment, struck down this wholly logical extension of what the Law School contends here. *Id.* at 1264.[7]

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[7] The court below also relied heavily on the notion that the Law School had a compelling interest in using racial preferences in order to enroll a "critical mass" of "underrepresented" minority students. *See* Pet. App. 7a-8a, 28a. The lower court's endorsement of "underrepresentation" to achieve certain levels of racial representation in its student body is a mask for racial balancing for its own sake. "Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in (...continued)

As Judge Boggs explained in his dissenting opinion below, such "underrepresentation" and "overrepresentation" rationales inherently devolve into justifications for strict quotas. "Using only the constitutionally protected classes of national origin, no ethnic background is a majority." Pet. App. 127a-28a. Once the University of Michigan embarks on the goal of adequate representation for each group, "by the inexorable laws of mathematics, the existence of a critical mass or rough proportionality for each group so considered means that what is left for the remainder of the groups (the formerly 'over-represented') is no more than its own critical mass of 'rough proportionality.'" *Id.*

Academic freedom and "educational judgment" cannot be turned into a license to subvert an *individual's* right to protection under the Fourteenth Amendment because some educators believe that doing so advances the interests of some or all racial groups.

B. The Law School's Reliance on Justice Powell's Diversity Rationale Ignores *Bakke*'s Controlling Holding.

The Law School cannot claim any reasonable expectation that its racial-preference policy is constitutional based on the "diversity" rationale in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), because that rationale has never been adopted by this Court. When this Court's analysis of fragmented decisions in *Marks v. United States*, 430 U.S. 188, 193 (1977), is applied to *Bakke*, the Court's holding in that case becomes clear: a racial classification may be used only to

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institutions," *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)); *see also Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998).

remedy identified acts of past racial discrimination by the institution proposing the remedy.

The Sixth Circuit erred in ruling that, under *Marks*, "the rationales [of the separate opinions] supporting the Court's judgment need not overlap on essential points in order to provide a holding that binds lower courts. Indeed, if the Justices agreed on essential points, the *Marks* analysis would be unnecessary." Pet. App. 14a. On the contrary, *Marks* directs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation marks and citation omitted).

"It is important to realize that the *Marks* test does not look for the 'narrowest opinion' or the 'narrowest analysis,' but rather the 'narrowest grounds' for the judgment. That is, if only one aspect of the analysis in Justice Powell's opinion overlaps with one aspect of the analysis in Justice Brennan's opinion, then only that one aspect constitutes the 'holding' of the Court." Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 341 (July 2001).

Justice Powell's opinion discussed several different rationales for the use of race in admissions, but the Justice found a state's use of race appropriate in only two instances. First, he found that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," based on specific findings and "subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the [same position]." *Bakke*, 438 U.S. at 307-08. Second, and separately, he found that the university had a compelling interest in the "attainment of a diverse student body." *Id.* at 311.

Justice Brennan's opinion, for himself and three others, addressed only the first set of circumstances – past racial discrimination – in which Justice Powell found that the use of race was permissible. Justice Brennan opined that racial preferences could be used to remedy "past and present" "societal discrimination" for which there had been no identified acts of past discrimination by the state actor. *See id.* at 369. Justice Brennan's opinion overlapped with Justice Powell's diversity rationale only to the extent that Justice Powell's rationale was restricted to a remedy for past or present societal discrimination. *See id.* at 326 n.1 ("[T]he Harvard plan [upon which Justice Powell heavily relied to justify his 'diversity rationale'] . . . is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*") (emphasis added).

In this regard, "the circumstances in which Justice Powell would have permitted the use of race in admissions – whenever the past discrimination had been identified by governmental findings – were a subset of the circumstances in which Justice Brennan, et al., would have permitted the use of race in admissions – whenever there had been past discrimination without regard to governmental findings." Fitzpatrick, *supra*, at 341-42. Accordingly, a correct application of the *Marks* analysis *does* yield a "holding" of the Court regarding when race can be used in admissions – *i.e.*, whenever there are identifiable acts of discrimination committed by the state institution that itself now seeks to employ racial preferences.

The Law School thus had no reasonable expectation that its use of race to achieve "diversity" was legal under *Bakke*. When that decision is analyzed the way this Court in *Marks* directed that such a fragmented decision should be analyzed, it shows that the Court held that race could be used only when there were identified acts of past discrimination

by the state actor employing the racial classification. And that is not claimed to be so in this case. As the district court noted, "no party in this case has alleged, or offered any evidence to suggest, that the law school or the University of Michigan has committed any acts of discrimination against any minority group which might warrant a race-based remedy." Pet. App. 293a n.64.

III. EDUCATORS' RELIANCE ON GROUP IDENTITY HAS LED TO LESS, NOT MORE, CAMPUS INTEGRATION.

This Court's holdings rejecting the allocation of benefits and burdens by the state based on membership in a racial group, or because such membership is assumed to carry with it certain desired attributes or experiences, are well founded. The alternative – as the current state of our nation's campuses shows – is racial balkanization and separation in an environment that suppresses individual liberty.

In justifying its opinion, the court below relied, in particular, on the Law School's proffered theory of "critical mass" – *i.e.*, that there "is a number [of underrepresented minority students enrolled] sufficient so that under-represented minority students can contribute to classroom dialogue and not feel isolated." Pet. App. 28a. The court of appeals went on to say that the role of critical mass was to ensure "sufficient numbers" such that "under-represented minority students do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences." *Id.*; *see also supra* n.7. As the court of appeals put it, quoting the Law School with approval, "students from under-represented minority racial and ethnic groups" are "'particularly likely to have experiences and perspectives of special importance to [the Law School's] mission'." Pet. App. 27a (alteration in original).

Such fostering of group over individual identity by universities has led to *more*, not less, racial balkanization on our nation's campuses. In a report recently released by the New York Civil Rights Coalition, the authors concluded that "[t]he same schools[8] that use race as a factor to achieve inclusionary admissions will also permit its use as a factor in the selection of roommates and preferences for living quarters in campus housing, for scholarships, and even for the remediation and counseling of 'at risk' students. Race and ethnicity considerations permeate almost every facet of campus life." Ramin Afshar-Mohajer & Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education* (Sept. 9, 2002), *available at* nycivilrights.org/reports/pdfs/nycrc_campusreport.pdf.

In this study, the New York Civil Rights Coalition found that:

- "Colleges create special administrative positions and offices that strengthen separatist organizations with special facilities, funding, and advising";
- "Colleges organize separate events and programs for minority students";

[8] The study profiles thirty-two colleges and universities: Amherst College, Boston College, Boston University, Brown University, Buffalo State College, Columbia University, Cornell University, CUNY Brooklyn College, CUNY Queens College, Emory College, George Washington University, Georgetown University, Haverford College, Massachusetts Institute of Technology, New York University, Northwestern University, Oberlin College, Pennsylvania State University, Princeton University, Smith College, Stanford University, SUNY Cortland, Swarthmore College, University of California at Berkeley, University of Pennsylvania, University of Massachusetts at Amherst, University of Wisconsin-Madison, Vanderbilt University, Vassar College, Wesleyan University, Williams College, and Yale University.

- "Administration-supported minority student organizations on campus separate minority students from the rest of the population, marginalizing their viewpoints and making generalizations about each group";
- "Colleges provide remedial services specifically geared towards minorities, stigmatizing minority populations";
- "Colleges provide courses and departments with a politically correct tilt"; and
- "Colleges provide special-interest housing for minorities."

Id. at iii-iv, 1-2.

The chapter of the report on "special-interest" or "theme" housing is instructive. *Id.* at 21-23. The authors recount how university-sponsored "cultural" housing has led to "self-segregation" on campuses. *Id.* at 21. Accordingly, "[t]hese houses divert minority students from random housing assignments." *Id.* at 22. And "[m]any of these racially-based houses make it very clear in their mission statements that their goal is racial consciousness and identity, thus precluding the concept of a unified campus." *Id.*

The Civil Rights Coalition authors could have been writing about the University of Michigan. For example, the University provides minority undergraduates with segregated advising services to aid in "the retention of minority students."[9] The University's "minority peer advisor assistants" help "African Americans, Native Americans, Asian Americans, and Hispanic/Latino/Latina Americans" adjust to college life. They are instructed to "identify[ ], be[ ]

[9] *See* housing.umich.edu/resed/mpa.html (visited Dec. 20, 2002).

accessible to, and establish[ ] ongoing communication with students of color in the[ir] hall," "assist[ ] in orientation of students of color to the hall and campus," and "assist[ ] with various aspects of academic advising in order to assist students of color in making academic decisions."[10] The University likewise runs special, race-specific "leadership retreats" for African-American, Native American, Asian-Pacific, and Hispanic-American students.[11]

The University explains that its programs are designed not to integrate students, but to further "racial/ethnic identity development."[12] Accordingly, minority peer advisers are instructed to "assist[ ] in the education of students and staff to promote differences particularly those associated with race, ethnicity and culture."[13] Similarly, the University's Multi-Ethnic Student Affairs program lists one of its goals as "community development" through "ethnic specific community task forces."[14]

Thus it is that the ideal of diversity, when achieved by racially conscious admissions policies, turns into the reality of segregation.

[10] *Id.*

[11] *See* housing.umich.edu/~salead/main.html (visited Jan. 14, 2003).

[12] Multi-Ethnic Student Affairs: Mission, *available at* umich.edu/~mesamss/About%20MESA/about2.htm (visited Jan. 14, 2003).

[13] *See* housing.umich.edu/resed/app/positions/mpa_assistant.pdf (visited Dec. 20, 2002).

[14] Multi-Ethnic Student Affairs: Mission, *available at* umich.edu/~mesamss/About%20MESA/about2.htm (visited Jan. 14, 2003).

IV. UNIVERSITIES' RELIANCE ON GROUP IDENTITY HAS COME AT THE EXPENSE OF INDIVIDUAL EXPRESSION.

Theories of group identity and group experience are contrary to the basic premises on which our country was founded and on which the Fourteenth Amendment rests. Further, universities' reliance on such theories of group identity and experience operates in practice to abridge individual expression that questions those very theories.

Universities' promotion of group identity has had consequences beyond racial balkanization and separation on campus. It has also led universities to define (and enforce) "acceptable" and "unacceptable" viewpoints on controversial racial issues, including their use of racial preferences in admissions. In other words, views questioning universities' orthodoxy on these issues are at best discouraged and disparaged, and at worst stifled. There have been several noteworthy events at the University of Michigan. Similarly, NAS's own experience in conducting its research documenting faculty views on racial preferences illustrates the climate on campus that afflicts those questioning the basis for such preferences.

The University of Michigan's 1988 "policy guidelines" on "discriminatory harassment" provide a relevant example. The guidelines instructed that "[e]xperience at the university has been that people almost never make false complaints about discrimination," and that to reach the goal of "vigorous intellectual discussion in the classroom," "students must be free to participate in a class discussion without feeling harassed or intimidated by others' comments."[15] In addition, the University's "Office of

[15] Quoted in DINESH D'SOUZA, ILLIBERAL EDUCATION 143 (1991).

Affirmative Action issued a guide entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*, precisely to specify prohibited conduct." ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY 103-04 (1998). The guide "had a section of examples, under the heading: 'You are a harasser when . . . .' These included: 'You tell jokes about gay men and lesbians, [or] you display a confederate flag on the door of your room in the residence hall' and 'You comment in a derogatory way about a particular person [sic] or group's physical appearance or sexual orientation, or their cultural origins, or religion.'" *Id.* at 104 (alterations in original). The Michigan harassment code was so restrictive that it was eventually struck down by a federal district court as violating the First Amendment. *See Doe v. University of Michigan*, 721 F. Supp. 852, 868 (E.D. Mich. 1989).

Nevertheless, informal campus pressures are still present at the University of Michigan. Michigan sociology professor Reynolds Farley observed, for instance, that, although he is a supporter of affirmative action programs, "we cannot [even] . . . argu[e] here [at the University of Michigan] . . . that preferential programs cast aspersions on the achievements of blacks . . . without the risk of being attacked and stigmatized." D'SOUZA, *supra*, at 150. Indeed, Professor Farley eventually became the subject of calls for a public tribunal at the University because of statements he made in class summarizing the arguments of critics of African-American leaders Malcolm X and Marcus Garvey. *Id.* at 148-49.

The environment at other universities is scarcely better. The University of Connecticut administration began an investigation of the research center that conducted the NAS-sponsored surveys of faculty views on racial preferences described in Part I.A above. As one commentator recounts, "several professors affiliated with the

university's Puerto Rican/Latino Cultural Center demanded an investigation of the university's own Center for Survey Research and Analysis (formerly the Roper Center) [the organization that conducted the survey]" as a result of the faculty surveys' findings. Wood, *Who Speaks For Higher Education on Group Preferences*, *supra*, at 42-43; *see also* Doug Hardy, *UConn Survey Spurs Angry Responses, Questions*, J. INQUIRER, Apr. 19, 2000, at 5. In response, "the interim chancellor of the University of Connecticut, agreed to the agitators' demands and created a task force to examine how [the Center] 'conducts research for external organizations.'" Wood, *Who Speaks For Higher Education on Group Preferences*, *supra*, at 43.

The commentator continued that the Connecticut polling center used by NAS "does polling for many external organizations" including "liberal organizations," but there had never been any protests against the center's activities in those instances. *Id.* Nor were there ever any previous university investigations into the center's practices. *See id.*

The commentator concluded that "advocates of racial preferences at the University of Connecticut apparently believe that the university cannot tolerate the scientific sampling of faculty opinion on racial preferences, even by a duly constituted agency of the university. Their real objective – and the real objective of their like-minded colleagues at other universities – is simply to silence those who disagree with them." *Id.*

* * *

The central premise of the Law School's "diversity" program – like so many other universities across the country – is that "students from groups which have been historically discriminated against ... have experiences of special importance to [the Law School's] mission." *E.g.*, Pet. App. 7a, 27a (alteration in original); *accord* Br. in Opp. 3. This "group identity" premise for the Law School's policy is not

only legally and factually unsupportable; it has also led to perverse consequences, such as increased campus racial balkanization and separation, as well as suppression of campus *intellectual* diversity. These consequences are diametrically opposed to the Law School's avowed purpose in adopting its racial-diversity policies.

CONCLUSION

For the foregoing reasons, NAS urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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